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September 16, 1994

Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: PR File No. 94-SP3

Dear Secretary:

Enclosed are an original and ten (10) copies of the two pleadings entitled **THE CELLULAR CARRIERS ASSOCIATION OF CALIFORNIA OPPOSING THE PETITION OF THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA TO RETAIN STATE REGULATORY AUTHORITY OVER INTERSTATE CELLULAR SERVICE RATES** and **MOTION OF THE CELLULAR CARRIERS ASSOCIATION OF CALIFORNIA TO REJECT PETITION, OR, ALTERNATIVELY REJECT REDACTED INFORMATION.**

Please file these documents and return one copy of each, file stamped, to the messenger who presents these documents for filing. Thank you for your assistance.

Very truly yours,

Michael B. Day

ORIGINAL

94-105

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

In the Matter of	)	
	)	
Petition of the People of the	)	
State of California and the	)	
Public Utilities Commission	)	PR File No. 94-SP3
of the State of California	)	
to Retain Regulatory Authority	)	
over Intrastate Cellular Service	)	

MOTION OF THE CELLULAR CARRIERS ASSOCIATION OF CALIFORNIA TO REJECT PETITION OR, ALTERNATIVELY, REJECT REDACTED INFORMATION

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Attorneys for Cellular Carriers Association of California

September 19, 1994

UNITED STATES OF AMERICA
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SUMMARY

By this motion, the Cellular Carriers Association of California ("CCAC") seeks to prevent consideration by the Federal Communications Commission ("FCC") of the confidential material filed under seal by the California Public Utilities Commission ("CPUC") in support of its petition to retain its existing authority over the rates for cellular services within California.

In order to retain its regulatory authority over cellular rates, CPUC was required to petition the FCC and submit evidence which demonstrated that prevailing market conditions will not adequately protect cellular subscribers from unjust and unreasonable rates. CPUC filed such a petition on August 10, 1994. Interested parties were then afforded 30 days to respond to the petition by way of comments "based on evidence that can rebut the showing made in the petition." The tactics employed by CPUC have effectively precluded CCAC and other interested parties from responding in an effective manner to its petition.

As a preliminary matter, the release of the information by CPUC to the FCC appears to be in violation of applicable California code provisions. Moreover, the nature of the material submitted by CPUC under seal is commercially sensitive, disclosure of which would place CCAC's member cellular carriers at a competitive disadvantage. Thus, CCAC is forestalled from seeking release of this information. At

the same time, however, CCAC is prevented from reviewing the material under seal and is left with a redacted version of CPUC's petition which is skeletal in nature. The result is that CCAC is not only prevented from assessing the accuracy of the data used by CPUC, but also the validity of CPUC's methodology for interpreting such data -- i.e., CCAC has been prevented from effectively commenting on CPUC's petition. Such prevention is not only in violation of the notice and comment procedures of the Administrative Procedure Act, but also the procedures established by the FCC in this proceeding. Accordingly, because of such procedural deficiencies, should the FCC rely on the nondisclosed information in rendering its decision on the CPUC petition, it would be subject to being overturned on review for acting in an arbitrary and capricious manner.

MOTION OF
THE CELLULAR CARRIERS ASSOCIATION OF CALIFORNIA
TO REJECT PETITION OR, ALTERNATIVELY,
REJECT REDACTED INFORMATION

Pursuant to Rules 41 and 44 of the Rules and Regulations of the FCC, 47 C.F.R. §§ 1.41 and 1.44, CCAC hereby requests that the FCC reject in whole or in part (as more fully described below) the Petition of The People of the State of California and the Public Utilities Commission of the State of California to Retain State Regulatory Authority over Intrastate Cellular Service Rates ("CPUC Petition") filed in the above captioned proceeding on August 10, 1994. In support of this motion CCAC submits the following:

I.

BACKGROUND

The 1993 Omnibus Reconciliation Budget Act ("Act") defined a federal regulatory framework governing commercial mobile radios services ("CMRS"), including cellular services. 1/ Section 332(c)(3)(A) of the Act generally preempts states from regulating the entry of, or rates charged by, any commercial mobile service. Notwithstanding the preemptive language contained in Section 332(c)(3)(A), the Act provides that a state, which had in effect any regulation governing the rates for any CMRS offered in such state as of June 1, 1993, may petition the FCC for authority to regulate

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1/ Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6006(b)(2)(A), § 6002(b)(2)(B), 107 Stat. 312, 392 (1993).

the rates for any commercial mobile service and the FCC must grant such petition if the state demonstrates that:

> (i) market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or
>
> (ii) such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such state.

The FCC was directed to provide "reasonable opportunity for public comment in response to such petition[s]." Accordingly, the FCC, in its Second Report and Order in this proceeding, established certain procedures for the filing of such petitions. Specifically, the FCC provided that:

> [W]ith respect to petitions seeking to demonstrate that prevailing market conditions will not protect CMRS subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory . . . the states must submit evidence to justify their showings. . . . [I]nterested parties will be allowed to file comments in response to these petitions within 30 days after public notice of the filing of the petition. The comments should also be based on evidence that can rebut the showing made in the petition.

See Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Second Report and Order, FCC 94-31 (released March 7, 1994) ("Second Report and Order") (emphasis added).

On August 10, 1994, the People of the State of California and the CPUC filed a petition with the FCC seeking to retain state regulatory authority over intrastate cellular service rates in California. In its petition, the CPUC attested to "show with substantial evidence that continued regulatory oversight of cellular rates is necessary under Section 332(c)(3)(A)(i) [of the Act] because at this time the market forces are not adequate to protect California consumers from paying unjust and unreasonable rates for cellular service". CPUC Petition at 5.

The CPUC filed its Petition with the FCC under seal, with an accompanying "Request for Proprietary Treatment of Documents Used in Support" of the Petition ("Request"). In its Request the CPUC alleged that the materials for which it sought confidential treatment "contain proprietary data and materials concerning commercially sensitive information not customarily released to the public which, if disclosed, could compromise the position of a cellular carrier relative to other carriers in offering service in various markets in California." CPUC Request at 1-2. In addition, the CPUC's request for confidential treatment encompassed materials which were gathered by the Office of the California Attorney General in the course of an ongoing investigation and subsequently furnished to CPUC on the condition that they not be publicly disclosed without the Attorney General's consent. The end result of CPUC's request for proprietary treatment was that

the redacted version of CPUC's Petition which was distributed to the public for comment was skeletal in nature, with significant portions of the text and supporting appendices omitted.

CCAC submits that the tactics utilized by the CPUC necessitate that CPUC's Petition either be rejected or, at minimum, the FCC should not consider the redacted material in ruling on CPUC's Petition. First, the submission of the confidential material to the FCC is in violation of the CPUC's own General Order on the disclosure of confidential information. Second, certain portions of the confidential material submitted by the CPUC were obtained form the California Attorney General in violation of applicable California statutes. Third, the redacted version of the CPUC Petition released to the public is in a "bare bones" form, leaving parties without the ability to adequately respond. Fourth, should the FCC rely on the nonpublic information in rendering its decision on the CPUC's petition, such a decision would be subject to being overturned on review as an arbitrary and capricious agency action. Finally, the very nature of the material precludes CCAC from seeking its public disclosure and thus in order to insure the fairness of the notice and comment procedure, the FCC should set aside the redacted material.

II.

ARGUMENT

A. CPUC's Actions are in Violation of Its Own General Order On Release Of Confidential Information

CPUC General Order No. 66-C (copy attached as Appendix A) specifically excludes from the definition of the CPUC's public records "all records or information of a confidential nature furnished to or obtained by the Commission." The material submitted by the CPUC in support of its petition definitively falls within this exclusion. As acknowledged by the CPUC, certain of this material had been gathered by the State's Attorney General as part of an ongoing investigation of the cellular industry and had been furnished to the CPUC on a confidential basis. General Order No. 66-C identifies specific types of material excluded from the public records in order to extricate such material from CPUC's procedures for the treatment of public documents. Instead of such treatment, reference is made to the procedures for the handling of confidential information under the California Public Utilities Act:

> No information furnished to the Commission by a public utility, except such matters as are specifically required to be open to public inspection by the provisions of this part, shall be open to public inspection or made public except on order of the Commission.

California Public Utility Code § 583 (emphasis added) (copy attached as Appendix B). The CPUC, through its release of the confidential information to the FCC (thereby subjecting it to

potential release to the public), without first issuing an order justifying such a release has violated its own order on the treatment of confidential material. The CPUC should not be able to violate its own order merely because it is advantageous for it to do so. The FCC should not condone such action and should give no credence whatsoever to the confidential material filed by the CPUC in support of its Petition.

B. CPUC's Actions Further Aggravate the Potential Code Violation of the California Attorney General

As the CPUC states in its request for confidential treatment, a portion of the redacted material supporting its Petition are "materials provided to the CPUC by the Office of the Attorney General of the State of California gathered in the course of an ongoing investigation of the cellular industry within California to determine compliance with antitrust laws." This material was purportedly provided to the CPUC by the Attorney General pursuant to the authority granted the Attorney General under California Government Code section 11181 (copy attached as Appendix C). Review of this section, however, reveals that the Attorney General's office may have exceeded its authority.

Specifically, Section 11181(f) provides that, in connection with investigations and actions, the department may:

> Divulge evidence of unlawful activity discovered . . . from records or testimony not otherwise privileged or

> confidential, to he Attorney General or to any prosecuting attorney who has a responsibility for investigating the unlawful activity discovered, or to any governmental agency responsible for enforcing laws related to the unlawful activity discovered.

In releasing the information it had obtained in its investigation as to whether cellular carriers were in compliance with antitrust laws, the Attorney General's authority was confined to release to a governmental agency responsible for enforcing laws related to potential antitrust violations. The CPUC is not charged with enforcing the antitrust laws.

Although it cannot be seriously contested that regulatory agencies such as the CPUC should take antitrust considerations into account in considering the various actions of regulated utilities, such regulatory agencies do not have jurisdiction to determine violations of the antitrust laws. See Northern California Power Agency v. Public Utilities Commission, 5 Cal. 3d 370, 377 (1971), citing Northern Natural Gas Company v. Federal Power Comm'n, 399 F.2d 953 (D.C. Cir. 1968). The CPUC's consideration of antitrust issues is for the purpose of carrying out its legislative mandate to determine whether the public convenience and necessity (including public interest considerations) are being met by a proposed (or ongoing) utility action. Indeed, as the CPUC has the authority to approve utility actions which violate the

antitrust laws, as a mater of course it cannot be the agency charged with enforcing them. Id. at 378.

As the CPUC does not have enforcement authority over antitrust violations, the Attorney General did not have the requisite authority under California Code Section 11181 to release the information it had obtained in its investigation to the CPUC. The Attorney General's violation of the California Code has been compounded through the CPUC's release of the information to the FCC, especially as such release carries the potential of full public disclosure. The FCC should not condone the violation of a statute designed to protect the confidentiality of material provided in the course of an ongoing investigation. The FCC's consideration of the material obtained by the CPUC from the Attorney General, would send the message that a state agency can break its own laws in order to further its own position. Accordingly, the FCC should discount all material submitted by the CPUC which was obtained through the Attorney General's violation of the California Code.

C. CPUC's Actions Have Left Parties Without the Ability to Adequately Respond

The notice and comment procedures which the FCC must adhere to in determining whether to grant the CPUC's Petition are encapsulated within the Administrative Procedure Act ("APA") and have been used on a consistent and routine basis by the FCC. Specifically, Section 553 of the APA provides, among other things, that the notice of the proposed action

"shall contain either the terms or substance of the proposed rule or a description of the issues involved." 5 U.S.C. § 553(b)(3). After the required notice, the agency must give interested persons the opportunity to participate in the proceeding through the "submission of written data, views or arguments" (i.e., comments). See 5 U.S.C. § 553(c). It has been recognized that a key element to the efficacy of notice and comment proceedings is that parties be supplied sufficient data and the information relied upon by the agency, as well as all underlying methodologies employed, such that they are afforded a reasonable opportunity to participate. See, e.g., Florida Power & Light Co. v. U.S., 846 F.2d 765 (D.C. Cir. 1988); Metropolitan Hospital, Inc. v. Heckler, 762 F.2d 1561 (11th Cir. 1985).

The concept of notice and comment procedures was interjected into this proceeding through the Act which requires the FCC to provide reasonable opportunity for public comment in response to state petitions to maintain regulatory authority over cellular rates. The FCC more clearly defined this mandate by providing that parties may submit comments within 30 days of the notice of the petitions which "are based on evidence that can rebut the showing made in the petition." Second Report and Order at 94. If the FCC considers the material filed under seal in evaluating the CPUC's Petition, then the CCAC has been effectively denied the rights guaranteed it under the APA as well as effectively precluded

from doing what is required of it under the FCC's Second Report and Order.

The burden is on the CPUC to demonstrate that market conditions are not yet adequate to ensure just and reasonable cellular rates in California. See The Act at Section 332(c)(3)(A)(i). CPUC attests to have made such a showing. Specifically, CPUC claims that "based on [its] analysis of evidence presented in the record of its investigation into the wireless industry in California," it has made certain findings, including:

(1) In the near term, competitive pressure from alternate providers of cellular service will not be sufficient to check prices and earnings of the duopoly cellular carriers;

(2) The market share between the duopolist cellular carriers in the same markets in California has remained substantially the same over a five year period, and, relative to cellular resellers, has steadily increased at the latters' expense;

(3) Cellular rates in California are among the highest in the nation, and have failed to declined commensurate with substantial declines in capital and operating costs of providing cellular service;

(4) The market value of cellular spectrum reflects investors expectations of earnings well above levels normally found in competitive markets, and are not commensurate with the capital investment made to expand capacity of cellular systems or otherwise explained by spectrum capacity value.

CPUC Petition at ii. The CPUC concludes that "based on these findings [it] believes that it has sustained its burden of demonstrating that continued regulatory oversight of cellular service rates in California is necessary until new market

entrants are effectively competitive to ensure just and reasonable rates to California consumers". Id.

While the CPUC portends to illustrate the analysis and methodologies used to reach each of its purported findings, a majority of the data relied upon and much of the analysis used to interpret that data has been redacted from the version of the CPUC Petition released for public comment. A clear illustration of this is CPUC's supposed presentation that there is no significant competition at the wholesale level. To prove this point, CPUC points to the "relatively stable market share of facilities-based carriers for their wholesale operation" and cites to Appendix E of its Petition as support for this finding. Appendix E is completely redacted, leaving parties no opportunity to evaluate the data relied on by the CPUC to reach its boldly stated conclusion. Similar types of skeletal presentations (at least as viewed by the public) are made to support each of the CPUC's findings. 2/

The bottom line is that CCAC has been denied the opportunity to respond effectively to each of the subject findings through the use of countervailing submissions as it

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2/ Other examples of the material which has been redacted in its entirety include: (1) Appendix H, submitted to show financial data per subscriber unit (e.g., operating expenses, plant, operating income); (2) Appendix I, submitted to provide various rate comparisons; (3) Appendix J, submitted to show rate plan and customer data; (4) Appendix M, submitted to show capacity utilization rates.

has not been allowed access to the CPUC's data or analysis. In short, there is no way the CCAC can submit comments which are "based on evidence that can rebut the showing made in the petition," as the "showing" has been concealed. Through the CPUC's maneuvering, CCAC has been effectively precluded from doing what the APA gives it the right to do and which the FCC has directed it to do. Accordingly, the FCC should give no countenance to the confidential material submitted by the CPUC in support of its Petition.

D. CPUC's Actions, If Relied Upon, Leaves the Agency's Order Subject to Being Overturned

An agency commits grave procedural error when it fails to reveal portions of the technical basis of a proposed rule in time to allow meaningful commentary. See Connecticut Light & Power Co. v. Nuclear Regulatory Commission, 673 F.2d 525 (D.C. Cir. 1982); United States v. Nova Scotia Food Products Corp., 568 F.2d 240 (2nd Cir. 1977). Such rulings are grounded in the APA which charges administrative agencies to take into account all relevant matters in making a determination. See APA, 5 U.S.C. § 553(c). If the failure to notify interested persons of the research and data upon which the agency was relying actually prevented the presentation of relevant comments, then the agency may be held to not have considered all relevant factors. See Nova Scotia Food Products, supra, at 251. The failure of an agency to consider all relevant factors has been deemed to be arbitrary and capricious decisionmaking. See National Black Media Coalition

v. FCC, 791 F.2d 1016 (2nd Cir. 1986) (FCC Report and Order overturned as it was based on maps and studies which it had not adequately disclosed to the parties for comment).

Moreover, it is not sufficient for the agency to claim that the undisclosed studies relied upon were based on public data -- it is the methodology used in creating the studies and the meaning to be inferred from them which needs to be part of the public record. National Black Media Coalition, supra at 1023. Parties cannot be left to guess how the agency manipulated the information. As the court stated in Nova Scotia Food Products, supra, in addressing the agency's failure to disclose certain scientific data upon which its rule was based:

> When the basis for a proposed rule is a scientific decision, the scientific material should be exposed to the view of interested parties for their comment. One cannot ask for comment on a scientific paper without allowing the participants to read the paper. Scientific research is sometimes rejected for diverse inadequacies of methodology; and statistical results are sometimes rebutted because of a lack of an adequate gathering technique or of supportable extrapolation. . . . To suppress meaningful comment by failing to expose basic data relied upon is akin to rejecting comment altogether. For unless there is a common ground, the comments are unlikely to be of a quality that might impress a careful agency. The inadequacy in comment in turn leads in the direction of arbitrary and capacious decisionmaking.

Nova Scotia Food Products, supra at 252.

The analysis expressed in this line of cases is equally applicable to the current proceedings. The CPUC's Petition, in which it purportedly demonstrates that the cellular industry in California is not currently competitive and that market forces are inadequate to protect consumers from paying unjust and unreasonable rates, is premised to a large extent on data which has been redacted from the Petition. CCAC has been given no opportunity to (1) assess the accuracy of the data utilized by the CPUC; (2) determine the validity of the CPUC's methodology for interpreting that data; nor (3) check the accuracy of representation (in content and context) of the redacted portions of the CPUC's narrative which was derived from the material which had been provided to the CPUC on a confidential basis. In other words, there is no "common ground" between CCAC and the CPUC and thus CCAC is precluded from submitting comments of a quality that "might impress a careful agency". The inadequacy of comments submitted by the parties to this proceeding due to lack of exposure to the basic data and analysis which comprises the vast majority of the CPUC's Petition, could readily lead to a court determination that an FCC order reliant on the nondisclosed information is an act of arbitrary and capricious decisionmaking.

E. CPUC's Actions Have "Tied the Hands" of CCAC Necessitating That The Confidential Material Neither Be Disclosed Or Considered

The tactics employed by the CPUC have truly tied the hands of CCAC and the cellular carriers it represents. As illustrated below, CCAC is effectively precluded from seeking full public disclosure of the redacted material while at the same time, given the skeletal nature of CPUC's Petition, it has been prevented from reviewing the manner in which the CPUC has manipulated the data for presentation to the FCC.

Specifically, as stated in the CPUC's request for confidential treatment, a substantial portion of the redacted material supporting the CPUC's Petition is "proprietary data and materials concerning commercially sensitive information not customarily released to the public, and which, if disclosed, could compromise the position of a cellular carrier relative to other carriers in offering service in various markets in California." This information was provided to the CPUC by certain cellular carriers ("responding carriers") in response to data requests in an ongoing investigation into mobile service and wireless communications in California ("California investigation") and, to a large extent, consists of the subscriber and rate plan information of the individual cellular carriers.

In particular, this data consists of aggregate activated subscribers on the responding carriers' discount and basic rate plans, as well as the aggregate activated

subscribers of each responding carrier in total (broken down between wholesale and retail service). If this sort of data is released to the public, competitors of the responding carriers will have sufficient information to target their marketing strategies toward certain market segments. For example, the information would be sufficient to calculate a responding carrier's market share and penetration level in major markets, or to tailor discount plans and sales approaches. In short, a competitor would have the information necessary to allow it to focus its marketing resources in response to information about rivals that is not typically available in a truly competitive market.

The highly proprietary nature of this material and the danger to the commercial viability of the responding carriers if it is disclosed, was recognized in an August 8, 1994 ruling of the Administrative Law Judge charged with the California investigation. 3/ Therein, the ALJ determined that the disclosure of the type of information at issue would cause "imminent and direct harm of major consequence" which was not counterbalanced by "the public interest of having an open and credible regulatory process." In this regard, the ALJ pointed to the fact that "if a competitor knew a carrier's specific number of subscribers by market area applicable to the various categories [of subscriber and rate data] it could

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3/ See "Administrative Law Judge's Ruling Granting Motion for Modification of July 19, 1994 Ruling," Docket No. I.93-12-007, (August 8, 1994).

assess the carrier's strengths and weaknesses and adjust its marketing strategy accordingly." Based on this finding, the ALJ determined the necessity of keeping this information -- i.e., the same information which the CPUC has now provided to the FCC in support of its Petition -- confidential.

The very reasons found by the ALJ to necessitate keeping the information protected in the California investigation similarly preclude its disclosure within the context of this FCC proceeding -- i.e., it is of a commercially sensitive nature and could be used to the competitive disadvantage of the cellular carriers who submitted the subject data. Thus the CCAC and the carriers it represents are faced with a "Catch 22" situation -- they cannot seek disclosure of the material redacted from the CPUC Petition while at the same time they have no way of knowing whether the CPUC has made an accurate presentation of the data to the FCC or whether the CPUC has incorrectly analyzed or manipulated the raw data submitted by the responding carriers. Accordingly, CCAC avers that in order to protect the efficacy and fairness of these notice and comment proceedings, which the FCC is statutorily mandated to follow, the FCC must set aside the redacted material and neither release it to the public nor take it under consideration in acting on the CPUC's Petition.

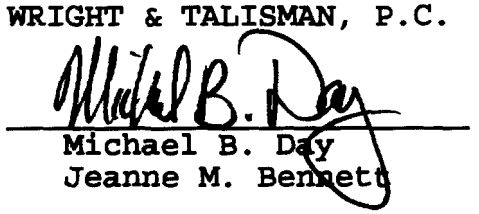
III.

CONCLUSION

For all the reasons stated above, CCAC respectfully requests that the FCC reject, in whole, the CPUC's Petition to Retain State Regulatory Authority over Intrastate Cellular Service Rates or, at minimum, the FCC, in rendering its decision should consider only the redacted version of the Petition made available to the public for comment.

Respectfully submitted,

WRIGHT & TALISMAN, P.C.

By 

Michael B. Day
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100 Bush Street
Suite 225
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Attorneys for
Cellular Carriers Association of California

September 19, 1994

carriers\1001-008.211

CERTIFICATE OF SERVICE

I, Jerome F. Candelaria, hereby certify that on this 19th day of September 1994, a true and correct copy of the foregoing MOTION OF THE CELLULAR CARRIERS ASSOCIATION OF CALIFORNIA TO REJECT PETITION OR, ALTERNATIVELY, REJECT REDACTED INFORMATION was mailed first class, postage prepaid to the parties listed below:

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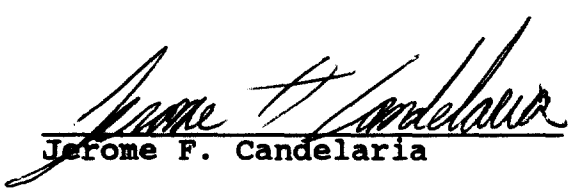

Jerome F. Candelaria